IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 7TH AUGUST 2007 / 16TH SRAVANA 1929

TRC.No. 519 of 2001

(TA.633/1992 of SALES TAX APPELLATE TRIBUNAL, ADDL.BENCH-II,ERNAKULAM)

PETITIONER/APPELLANT IN T.A. /ASSESSEE:

M/S. SARAF TRADING CORPORATION,
SARAF HOUSE, WILLINGDON ISLAND,
KOCHI – 682 003.

BY ADV. SRI.ANIL D. NAIR

RESPONDENT/RESPONDENT IN T.A./REVENUE:

STATE OF KERALA.

BY SR. GOVT.PLEADER SHRI MUHAMMED RAFIQ.

THIS TAX REVISION CASE HAVING BEEN FINALLY HEARD ON 07/08/2007, ALONG WITH T.R.C.No. 533 OF 2001 AND CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

H.L.DATTU, C.J. & K.T.SANKARAN,J.

T.R.C. NOS.519, 533, 534, 537 OF 2001,
25, 27, 30 & 34 OF 2002

Dated this the 7th August, 2007

O R D E R

H.L.DATTU, C.J.

The assessee is common in all these Tax Revision Cases. The issues involved are also common. Therefore, all these Revisions are clubbed together, heard and disposed of by this common order.

2. The one and the only issue that is raised for our consideration in these Revision Petitions is, whether the petitioner/the assessee dealer is entitled for refund of the tax which according to the assessee is erroneously collected by the department?

3. The assessee is a dealer registered under the Kerala General Sales Tax Act, 1963 (for short the "KGST Act) and under the Central Sales Tax Act, 1956 (for short "the Act"). The assessee is an exporter of tea carrying on business from Willingdon Island in Cochin. The assessment years in question are: 1976-77, 1977-78, 1979-80, 1980-81, 1981-82, 1982-83 and 1983-84.

4. During the relevant assessment years, the assessee had purchased tea in open auction for the purpose of export sales. We are told that during the relevant years, the brokers were not dealers under the Act and the brokers were made dealers under the Act only with effect from 1.4.1984.

5. In the open auctions, the tea was purchased by the

assessee for the purpose of exporting tea to foreign buyers. According to the assessee, the contract was between the planters and the dealers in the open auction that is held and the auction price would include tax payable under the Act, also.

6. In the assessment proceedings, the assessee had claimed exemption from payment of tax under the provisions of the Central Sales Tax Act in view of Section 5(1) read with Section 5(3) of the Act. Along with the claim, it had also made a claim for refund of the taxes paid to the State Government. The claim for exemption is allowed by the assessing authority, since the entire exports of tea was in pursuance to the prior contract with the foreign buyers and also was supported by bills of lading, export invoices etc. In so far as the claim for refund of tax, the same was rejected on the ground that it is the sellers who have paid taxes under K.G.S.T. Act and not the assessee.

7. The orders passed by the assessing authority is confirmed both by the first appellate authority and the Tribunal, keeping in view the provisions of Section 44 of the KGST Act. Aggrieved by these orders, the assessee is before us in these Tax Revision Cases. The assessee has raised the following questions of law for our consideration and decision:

> "i) In the facts and circumstances of the case ought not the Tribunal have allowed the appeal filed by the petitioner and ordered refund of tax which was erroneously collected from the petitioner?
>
> ii) In the facts and circumstances of the case ought not the Tribunal have held that refund of tax to the seller would amount to unjust and enrichment and that the petitioner was

entitled for refund of tax more so relying the judgment reported in (1998) 111 STC 467 and (1998) 111 STC 657?

iii) In the facts and circumstances of the case and in view of the fact that the authorities below have accepted the claim of exemption of the petitioner, ought not the Tribunal have allowed the claim of refund by the petitioner?"

8. Sri.Anil D. Nair, learned counsel appearing for the assessee contends, that the tax was paid by the assessee, since, the purchase price paid by him for the purchase of tea in the open auction is inclusive of tax payable under the K.G.S.T. Act and further submits that it is not in dispute that the entire purchase was in pursuance of prior contract with foreign buyers and the entire purchase of tea, in fact, has been exported and the same is evident from the orders passed by the assessing authority and therefore, the assessee is entitled for refund of tax paid by the assessee on its purchase of tea from the planters in the open auction.

9. Before we proceed further, it may be useful to extract the findings and the conclusions reached by the Tribunal while rejecting the claim of the assessee. The same is as under:

"In the present case, the appellant claimed exemption under Section 5(1) of the C.S.T. Act on export sales of tea for all the four years. The assessing authority accepted the claim and allowed exemption. No tax was demanded from the appellant on account of the above export sales of tea. Hence the question of refund of tax does not arise in the appellant's case since no tax has been demanded from the appellant in respect of the export sales of tea for all the four years. In the

above circumstances, no question of refund under Section 44 arises in the appellant's case.

It may be a fact that tax was collected from the appellant at the time of purchase of tea. Tea is a commodity which was liable to tax at the point of first sale in the State. Hence the sellers and collected tax at the time of effecting sales of tea to the appellant. The tax collected from the appellant have been remitted to the Government by the sellers of tea as provided in Section 22 of the K.G.S.T. Act. It was subsequently realised that the sale of tea to the appellant was the penultimate sale occasioning the export, which is not liable to tax as per Section 5(3) of the C.S.T. Act. As the law stands, the appellant cannot claim refund of tax collected from them by the sellers of tea. It is only the sellers of tea on whom an assessment has been made can claim refund of tax paid by them. The liability to tax on sale of tea was on the sellers and it is they who have paid tax to the Government. It is true that the sellers have collected tax from the purchases of tea as per Section 22 of the K.G.S.T. Act. But that does not mean that the buyer of tea, that is, the appellant in the present case now before us, can claim refund under Section 44 of the K.G.S.T. Act. As stated earlier, the appellant's counsel has placed reliance on the decision of the Honourable Supreme Court of India in State of Madhya Pradesh vs. Vyankatalal and others, (1987) 64 STC 6, in support of the contentions advanced before us. On going through the above decision of the Honourable Supreme Court, we find that the facts of the case entirely different from the facts in the present case now before us. In the present case now before us, we have found that the

> appellant is not entitled to claim the refund of tax under Section 44 of the K.G.S.T. Act. The authorities below were justified in rejecting the claim of refund. We confirm the findings of the authorities below. These appeals are without any merit.".

10. At this stage, it is relevant to mention, that, in the open auction held the planters had sold tea to the assessee. The assessee is an exporter. The incidents of tax was at the sale point. It has come on record that the sellers had collected tax. Though the price paid by the assessee is inclusive of tax, it has gone to the kitties of the sellers, namely, the planters.

11. Section 44 of the KGST Act makes it clear, that, when the assessing authority finds, at the time of final assessment, that the dealer has paid tax in excess of what is due from him, then only he will be entitled for refund of the excess tax.

12. In the instant case in the assessment proceedings no where it is stated by the assessing authority that it is the petitioner who had paid tax due under the Act. There is a categoric statement of the assessing authority in the assessment proceedings of the assessee that, it is the sellers who had collected the tax. The sellers are coffee planters and the petitioner is only the purchaser. Keeping all these aspects of the matter and properly analysing the provisions of Section 44 of the KGST Act, the authorities under the Act as well as the Tribunal has negatived the claim of the assessee. We are in full agreement with the findings and conclusions reached by the Tribunal. Therefore, the questions of

law raised by the assessee requires to be answered against the assessee and in favour of the Revenue.

Consequently, all pending Interlocutory Applications are also rejected.

Ordered accordingly.

(H.L.DATTU)
Chief Justice

(K.T.SANKARAN)
Judge

ahz/DK.